DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-67/#49302

PRELIMINARY RECITALS

Pursuant to a petition filed May 22, 2001, under Wis. Stat. §49.45(5) to review a decision by the Waukesha County Dept. of Human Services to deny Medical Assistance (MA), a hearing was held on July 10, 2001 at Waukesha, Wisconsin. A hearing set for June 13, 2001 was rescheduled at the request of the petitioner.

The issue for determination is whether the petitioner is permitted under the spousal impoverishment rules of the MA program to reallocate the couple's assets to the community spouse to increase her income allocation closer to the minimum monthly needs allowance; and b) whether the county agency correctly denied petitioner's institutional MA application due to excess assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:
Attorney Andrew Brusky
Brusky & Sjostrom, S.C.
2300 N. Mayfair Rd., #530
Wauwatosa, WI 53226-1530

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Linda Zellmer, ESS
Waukesha County Dept of Health and Human Services
500 Riverview Avenue
Waukesha, WI 53188

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, Cares #xxxxxxxxxx) is a resident of Waukesha County who has been determined to be disabled. He has been a resident at the Woodland Health Care Center since April 30, 2001; his wife, (petitioner spouse), remains in the community.

2. On May 22, 2001, the petitioner and his wife applied on behalf of petitioner for institutional MA under the spousal impoverishment program.

3. The county agency completed an asset assessment for the couple. See Exhibit 4. The total combined assets of the couple as of the petitioner's April 30, 2001 admission to the nursing home were $142,401.64. See Exhibits 1 & 2. The amount of assets allowed to be retained by the community spouse (community spouse asset share) was her resource allowance was set at $71,200.82. See Exhibits 1 & 2.

4. The county agency sent a notice to the petitioner stating that petitioner's May 22, 2001 institutional MA application has been denied because the total countable assets of $142,401.64 was above the community spouse's resource allowance of $71,200.82.

5. Petitioner has Social Security income of $286 per month. The petitioner's wife (community spouse) has Social Security income of $758 per month and a monthly pension of $95.40 from Masterlock. See Exhibit 2.

6. The couple's total non-exempt assets of $134,327.64 are income producing and create total monthly income of $233.28 at the time of petitioner's MA application. See Exhibit 2.

7. The total monthly income of petitioner and his wife (including the interest from all assets) is $1,372.68. See Exhibit 2. The petitioner and his wife have monthly expenses in excess of $1,372.68. See Exhibit 6.

8. If all the couple's countable assets are awarded to the community spouse, her monthly income totaled $1,372.68 which is still a shortfall of $562.32 from the minimum monthly needs allowance of $1,935.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stat. §49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Wis. Stat. §49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

The county determined that the current asset allowance for this couple is $73,200.82 ($71,200.82 + $2,000). See the MA Handbook, App. 23.4.2, which is based upon Wis. Stat. §49.455(6)(b). $2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

The issue in this case is the county agency's denial of the petitioner's MA application based on excess assets. Sec. 49.455, Wis. Stats., is the Wisconsin codification of 42 U.S.C. s. 1396r-5, known as MCCA. Petitioner seeks to have the hearing examiner reallocate resources under sec. 49.455(8)(d), Stats., to provide his community spouse the maximum monthly income allowed by sec. 49.455(4)(a)2.

In addition, the maximum income amount calculated under sec. 49.455(4)(b) in this case is currently $1,935, (plus excess shelter expenses above $580.50 per month, where applicable though not applicable in this case.) See also the MA Handbook, App. 23.4.1 and 23.6.0.

Under sec. 49.455(6)(b), the community spouse, in 2001, is allowed to keep assets up to ½ of the total countable assets of the couple when the asset total is greater than $100,000 but less than $174,000. (This is added to the normal $2,000 asset limit.) See MA Handbook, App. 23.4.2. The agency took the approximately $142,401.64 in assets, subtracted the $71,200.82, and determined that petitioners' assets were approximately $71,000 above the asset limit, and the petitioner was not eligible for MA.

However, under sec. 49.455(6)(b)3, resources can be reallocated to the community spouse at a fair hearing. Sub. (8)(d) provides as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department **shall** establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). (Emphasis added).

Based upon the above, a hearing examiner can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

Subsection (8)(d) quoted above includes a final sentence that requires the institutionalized spouse to make his or her income available to the community spouse before the assets are allocated. However, the Wisconsin Court of Appeals, in Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, __ N.W. 2d __, concluded that the final sentence violated the mandate of the federal MCCA law. The Blumer court held that the hearing examiner first must allocate resources to maximize the community spouse's income, and only if the resources' income does not bring the community spouse's income up to the monthly minimum can the institutionalized spouse's income be allocated. The Blumer decision is on appeal to the United States Supreme Court, but currently it is the law that must be followed.

The result in this case is as follows. Petitioner's wife's monthly income was $853.40. The petitioner's income is $286. Allocating all the income from the couple's countable assets to the community spouse plus all the other income only increases her total monthly income to $1,372.68. Since the total income still is below $1,935, the petitioner's wife is entitled to a reallocation of the couple's assets as the community spouse to increase her income allocation closer to the minimum monthly needs allowance plus the full income allocation from the petitioner.

CONCLUSIONS OF LAW

1. The county agency incorrectly denied petitioner's May 22, 2001 MA application due to excess assets.

2. All of the non-exempt assets of petitioner and his wife must be allocated to his wife to maximize her monthly income.

3. The petitioner's wife is entitled to a full reallocation of petitioner's income to increase her income closer to the minimum monthly needs allowance.

NOW, THEREFORE, it is ORDERED

That the matter is remanded to the county agency with instructions to: a) allocate all of the couple's non-exempt assets to the community spouse and to allocate income from the petitioner to his wife to raise the community spouse closer to the monthly minimum needs allowance; and b) certify the petitioner as MA eligible, within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this _____ day of _____, 2001.

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
9-6-2001gmw

cc: Waukesha County DHS
DHFS – Susan Wood